

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION AT HAMMOND

IN RE: )  
DONALD LEE CHESNEY )  
TIGRE CHESNEY ) BANKRUPTCY NO. 04-66306  
Debtors )

I.

MEMORANDUM OPINION  
AND  
ORDER

\_\_\_\_\_ This Chapter 13 case is before the Court on the Motion filed by J. P. Morgan Chase Bank, N. A., Successor by Merger to Bank One, N. A. ("J. P. Morgan") on June 3, 2005 for Relief from Memorandum Opinion and Order dated May 25, 2005 and entered on the docket by separate Order on May 26, 2005 pursuant to Fed. R. Bk. P. 9021, which denied the Objection by J. P. Morgan to the Plan filed by the Debtors, David Lee Chesney and Tigre Chesney ("Debtors").

Pursuant to Order dated June 9, 2005 and N. D. Ind. L.B.R. B-9023-1(b) the Debtors were granted to and including June 23, 2005 to respond to said Motion.

The Debtors on June 13, 2005 filed their Objection to J. P. Morgan's Motion.<sup>1</sup>

II.

DISCUSSION

J. P. Morgan's Motion is based upon Fed. R. Civ. P. 60(b), as made applicable by Fed.

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J. P. Morgan did not file a separate request for oral argument as to its Motion pursuant to N. D. Ind. L.B.R. B-7007-2(b), as made applicable by N. D. Ind. L.B.R. B-9023-1(c), and thus oral argument has been waived. The Court does not deem oral argument necessary. See, N. D. Ind. L.B.R. B-7007-2(b).

J. P. Morgan asserts that it complied with the Court's Prehearing Order dated March 16, 2005 in that it attached a copy of an appraisal of the Debtor's real estate to its original Objection to Confirmation filed by it on March 3, 2005, and that it had its expert witness available to testify at the final evidentiary hearing scheduled for May 18, 2005.

This is simply not correct. As acknowledged by J. P. Morgan, a second appraisal was performed by J. P. Morgan on April 4, 2005, and the Appraisal Report was admittedly not provided by J. P. Morgan to the Debtors seven days prior to the hearing as expressly required by paragraph five of its Prehearing Order dated March 16, 2005, which also expressly provided that if said report was not timely provided by J. P. Morgan to the Debtors any such expert witness may be precluded from testifying. This failure to provide the Report based on the April 4, 2005 appraisal is the basis for the Court's Order.

J. P. Morgan's Motion is completely devoid of any allegations setting out specific operative facts that the failure to provide said report to the Debtors based on the April 4, 2005 appraisal was based on a justifiable mistake of J. P. Morgan that requires relief from the Court's Order. It is uncontroverted that J. P. Morgan wholly failed to comply with the Prehearing Order, which was highly prejudicial to the Debtors in their preparation for and submission of this Contested Matter. The purpose of the Prehearing Order was to prevent "trial by ambush" that the Federal Rules of Civil Procedure are designed to prevent. See,

Khan, 321 B.R. 709, 711 (Bankr. N. D. Ill 2005). The Court agrees with J. P. Morgan that the Debtor has the burden of proving the conditions of confirmation in §§1322 and 1325(a). See, Lundin, Chapter 13 Bankruptcy 3<sup>rd</sup> Ed. (2000 + Supp. 2004) §217.1 P. 217-1 + N.1 (Collecting cases). However, as observed in the Court's Memorandum Opinion and Order, the case law is well established that J. P. Morgan, as the Objectant, has the initial burden of coming forward with the evidence in support of its objection. See, Lundin on Chapter 13 Bankruptcy 3<sup>rd</sup> Ed. (2000 + 2004 Supp.). §217.1, P. 217-3 + NN. 3 + 4 (Collecting cases). In fact, the Court's Prehearing Order dated March 16, 2005 at paragraph six stated that the initial burden of coming forward on the evidence was on J. P. Morgan as the Objectant.

It is therefore,

ORDERED, ADJUDGED, AND DECREED, that the Motion by J. P. Morgan for Relief from the Memorandum Opinion and Order of the Court dated May 25, 2005 should be and is hereby DENIED.

The Clerk shall enter this Order upon a separate document pursuant to Fed. R. Bk. P. 9021.

Dated: June 17, 2005

  
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JUDGE, U. S. BANKRUPTCY COURT

Distribution:  
Debtors  
Attorney Vawter  
Attorney Eyster  
Trustee  
U. S. Trustee